BLANK
PAGE

LIBRARY
SUPREME COURT, U. S.

No. 523

Office Supreme Court, U.S.
FILED
SEP 2 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1965

ANTHONY ALBANESE,

Petitioner,

—against—

N.V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Co-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF ANTHONY ALBANESE

PHILIP F. DICOSTANZO
Attorney for Petitioner
Office & P. O. Address
66 Court Street
Brooklyn, New York 11201

ROBERT KLONSKY
On Petition

BLANK PAGE

INDEX

	PAGE
Jurisdiction	2
Questions Presented for Review	2
Statute Involved	4
Statement of the Case	5
Reasons for Granting the Writ	10
Conclusion	15
Appendix A—	
Safety and Health Regulations for Longshoring (29 C. F. R. Sec. 9.1 et seq.), promulgated by the Secretary of Labor under the authority of Public Law 85-742, 72 Stat. 835, 33 U. S. C. A. Sec. 941 et seq.	16
Appendix B—	
Revised Opinion of June 15, 1965	20
Appendix C—	
Original Opinion of April 9, 1965	27
Appendix D—	
Judgment of Court of Appeals	34

TABLE OF AUTHORITIES:

Cases: PAGE

Amador v. A/S J. Ludwig Mowinckels, 224 F. 2d 437, 441, C. A. 2 1955 11

Berti v. Compagnie de Navigation, etc., 213 F. 2d 397, C. A. 2 1954 ..... 9, 11, 12

Crumady v. The Fisser, 358 U. S. 423 ..... 11, 12

Filipek v. Moore-McCormack Lines, Inc., 258 F. 2d 734, C. A. 2 1958, cert. den. 359 U. S. 927 ..... 9, 11, 12

Gutierrez v. Waterman S.S. Corp., 373 U. S. 206 11

Halecki v. United New York and New Jersey Sandy Hook Pilots Association, 251 F. 2d 708, 358 U. S. 613, 282 F. 2d 137, 302 F. 2d 840 ..... 8, 9, 11, 12

Holley v. The Manfred Stansfield, 186 F. Supp. 212, 215; remanded by 269 F. 2d 317 11

Kernan v. American Dredging Co., 355 U. S. 426 ..... 7, 14

Myers v. Reading Co., 331 U. S. 477 14

Palermo v. Luckenbach Steamship Co., Inc., 246 F. 2d 557, 561, C. A. 2, revd. 355 U. S. 20, 78 S. Ct. 1 10

Pioneer S.S. Co. v. Hill, 227 F. 2d 264, C. A. 6 1955 11

Provenza v. American Export Lines, 324 F. 2d 660 ..... 4, 7, 14

Sieracki v. Seas Shipping Co., 328 U. S. 85 12

PAGE

Other Authorities:

Safety and Health Regulations for Longshoring (promulgated by the Secretary of Labor pursuant to Public Law 85-742, Stat. 835, 33 U. S. C. A. 941 a to g) 4, 5, 7, 14

Supreme Court of the United States Rules 19(1, b) and 20 2

28 U. S. C. 1254 (1) and 2101 2

BLANK PAGE

Supreme Court of the United States

October Term, 1965

ANTHONY ALBANESE,

Petitioner,

—against—

N.V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Co-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF ANTHONY ALBANESE

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Anthony Albanese, prays that a Writ of Certiorari be issued to review the revised decision and judgment of the United States Court of Appeals for the Second Circuit, filed June 15, 1965, and the denial of a petition for rehearing and rehearing *in banc,* filed June 15, 1965 with the revised opinion; reversing a final judgment entered in the United States District Court for the Southern District of New York on April 17, 1964, after a general jury verdict based on a longshoreman's personal injury action for maritime negligence and breach of respondent's warranty of seaworthiness.

The initial opinion of the Court of Appeals, decided on April 9, 1965 after argument on December 3, 1964, and the revised opinion of the Court of Appeals on June 15, 1965, filed with the denial of petitions for rehearing, are in the appendix to this petition as B and C. The revised opinion of June 15, 1965 is officially reported at 346 F. 2d 481. There was no written opinion by the trial Judge, Irving Ben Cooper, *D.J.*

Jurisdiction

Judgment was initially entered in the United States Court of Appeals on April 9, 1965, and withdrawn on June 15, 1965 for the entry of a new judgment on June 15, 1965 together with the revised opinion. Both judgments of the Court of Appeals reversed the judgment of the District Court on both the complaint and the claim over and remanded them for a new trial.

Jurisdiction to review the judgment by writ of certiorari is found in 28 U. S. C. 1254 (1) and 2101, as well as Rules 19 (1, b) and 20 of the Rules of this Court.

Questions Presented for Review

I

Because the trial Court's Charge to the jury defined maritime negligence to include *constructive notice* as a basis for finding lack of due care, was it not error for the Court of Appeals to reverse a longshoreman's judgment on the ground that he may only recover for maritime negligence if there be *actual notice* to the shipowner of a patently dangerous condition?

Fairly comprised in this question are the following:

1. Is there not retrogression in maritime law, in obvious disregard of clear and definitive holdings by this Court, for the Court of Appeals to dilute and reduce a longshoreman's remedy in negligence for injuries suffered aboard a merchant vessel on navigable waters, to less than he would expect in a common-law Charge on shore-based negligence?

2. Does the shipowner have a non-delegable duty to provide longshoremen with a reasonably safe place to work, sounding in negligence as well as unseaworthiness, to which it may respond in negligence on the trial Court's instruction, as follows:

"And apart from the actual notice you may find a condition which rendered the hold an unsafe area had existed for sufficient time to charge the defendant with constructive notice . . . the shipowner had a duty to the plaintiff to remedy those defects of which it knew or in the exercise of reasonable care should have known . . ."? (Vol. 1, App. to Def.-Appellant's brief, p. 16a.)

3. Though the Court of Appeals agrees there was sufficient evidence that "an unsafe condition in fact existed", and that there was no contributory negligence by petitioner, was reversal on the negligence cause of action justified on the basis that without control of the impact zone by active supervision of the stevedore's work the shipowner need not take "available steps to rectify a dangerous condition created by the stevedore which he does not know to exist"?

This question is asked in the context of admitted knowledge by officers of the shipowner that gasoline powered hilo machines were in use in the partly enclosed hatch,

that the parties agreed the hilos were not defective in any way so as to render the ship unseaworthy, and that the shipowner alone could have turned on the adequate ship's ventilating system, which it failed to do, thereby causing petitioner to suffer total and permanent brain damage by carbon monoxide poisoning.

II

On the second ground for reversing petitioner's judgment, in direct conflict with the 4th Circuit's *Provenza* v. *American Export Lines,* 324 F. 2d 660, was it error for the trial Court to instruct the jury that the pertinent provisions of the Safety and Health Regulations for Longshoring (promulgated by the Secretary of Labor pursuant to Public Law 85-742, Stat. 835, 33 U. S. C. A. 941 a to g, in effect before February 25, 1961, the date of the accident to petitioner), established generally accepted standards of safety equally binding on the shipowner and the stevedore?

III

Is there not a violation of petitioner's rights under the Seventh Amendment to the Constitution?

Statute Involved

Safety and Health Regulations for Longshoring, Public Law 85-742 (72 Stat. 835), 33 U. S. C. A. Section 941, of which the pertinent parts are Sections 9.1 (a and b) on Purpose and Authority, with references to compensation not read to jury; 9.2 (a and b) on Scope and Responsibility, also set forth in the footnote to the opinion below;

9.3 (c and d) on two definitions; 9.93(a) on the use of ventilation to reduce the carbon monoxide content of the hold, are all set forth in Appendix A to this petition. Also set forth in Appendix A is Section 9.93 (c, d and e) which petitioner's counsel offered but was not allowed in evidence.

Statement of the Case

In this maritime tort case the basis for federal jurisdiction in the Court of first instance was diversity of citizenship between petitioner, a citizen of the State of New Jersey, and respondent, a foreign corporation and citizen of The Netherlands, and damages in excess of the jurisdictional amount of $10,000.00 exclusive of interest and costs.

On February 25, 1961 the 51 year old petitioner, employed by the impleaded stevedore, was assigned to the No. 2 lower hold of respondent's M.S. SCHIEDYK for the purpose of loading steel sheets and tinplate. It was known to respondent and the stevedore that a gasoline powered hilo machine was required to move the heavy cargo in the hold. A second hilo in the upper 'tween deck was also used when another stevedore gang came at 10:45 A.M. to load similar cargo. The upper 'tween deck was partly covered with hatch boards to serve as a platform for the second gang. The hold was further confined by the placement of a rain tent over the square on the main deck. Though the hilos were in good condition, they necessarily emitted carbon monoxide fumes which affected the air in the lower hold. The ship was equipped with an adequate and operable air ventilating system, which could only be turned on by a ship's officer.

At no time prior to petitioner's collapse at about 11:20 A.M. had the ventilating system been turned on.

There was testimony by two longshoremen that they had requested the ship's mate on duty to turn on the ventilating system, that he assured them it would be done, and in the words of the opinion below "... that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed some time between 11:15 and 11:30 a.m. the blowers had not been turned on and the men left the hatch". The Court of Appeals does not refer to or acknowledge the following statement by respondent on page 5 of its brief on appeal:

> "For the purposes of this appeal it is, of course, assumed that the request to a mate to put on the ship's ventilating system, his promise to do so and request that the men keep working, is an established fact".

There is unequivocal testimony from the ship's mates, however, that they knew two hilo machines were in use in the partially covered hatch, that it was a good custom with these machines in the hold to turn on the ship's ventilating system, even when not requested to do so, and they were well aware of the toxic property of carbon monoxide fumes. (Vol. II, App. to Pl.-Appellee's brief, pp. 21a, 24a, 26a, 27a, 28a, 29a; Vol. I, App. to Def.-Appellant's brief, pp. 209a, 221a, 227a.)

Petitioner collapsed on part of the cargo when he and the other holdmen attempted to leave the air-contaminated lower hold. Respondent did not call a single expert witness to deny the proof of petitioner's total and permanent brain damage caused by exposure to carbon monoxide poisoning. The trial Court's instruction that petitioner was free of any contributory negligence as a matter of law was affirmed by the Court of Appeals, stating " . . . evidence was lacking that Albanese knew of the complaints or appreciated the

danger on the day of his injury, or indeed had any real choice of action if he had".

Though the opinion below finds sufficient evidence for the jury to conclude an unsafe condition in fact existed, which "might well have supported a verdict based on unseaworthiness", additional to the purported error of instruction on constructive notice, it finds error in the instruction that was not repeated in the jury Charge, to the effect that the Safety and Health Regulations were binding on the shipowner. The reasoning of the Court of Appeals which is not supported by the record as a whole is threefold;—that Section 9.2(b) is an excluding clause meant to absolve a shipowner from the standards of safety expressed in the regulations—that there was no testimony as to what the actual concentration of carbon monoxide in the hold was with respect to the level having been reached at which the stevedore was forbidden to work without blowers—that such regulations are not relevant to the issues between the petitioner and the shipowner and would tend to confuse the jury.

There is no reference in the opinion to the directly contrary 4th Circuit opinion of *Provenza* v. *American Export Lines*, 324 F. 2d 660, frequently mentioned and briefed on appeal by all parties. Respondent's brief on appeal at page 16 candidly refers to the regulations in light of *Provenza, supra,* as " . . . establishing a generally accepted standard of safety". Respondent itself first referred to these regulations, and offered portions thereof in evidence before the same jury that was also to decide the claim over. The trial Court allowed certain sections to be read to the jury, and denied admission of others offered by petitioner's counsel, all set forth in Appendix A to this petition. This Court's *Kernan* v. *American Dredging Co.*, 355 U. S. 426

was also a basis of the trial Court's instruction that a violation of a safety regulation binds the shipowner.

The opinion below does not discuss the portion of Section 9.2 on Scope and Responsibility that reads "nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom". Also overlooked was the uncontradicted proof of substantial air-contamination in the lower hold before and during petitioner's collapse, for which the shipowner cannot contend a new responsibility or duty. Though no one scientifically measured the level of gas concentration when petitioner was caused to suffer permanent brain damage, all being otherwise occupied at the time, particularly the mate on duty who was away from his post when the men came out of the hold shortly before police came to the scene, there is uncontradicted testimony and proof as to the dangerous level that exceeded the limits of safety. Even after the men had left and the hilos ceased operating, a police officer looked into the hold and observed its "hazy" condition. Petitioner's medical expert, uncontradicted by any other expert, testified that from the effect on petitioner one must assume an adequate concentration to cause intoxication by this odorless and colorless gas; that 2 per cent of carbon monoxide is sufficient to kill a person in a few minutes because hemoglobin has an affinity to it; that the effect varies with individuals, older persons suffering more because of their slower circulation time. At the time of the accident petitioner was 51 years of age.

The revised opinion cites *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, 282 F. 2d 137, C.A. 2 1960, 302 F. 2d 840, C.A. 2 1962, without reference to this Court's fulcrum opinion at 358 U. S. 613

which reversed the first Court of Appeals opinion at 251 F. 2d 708. There is no proof that the carbon tetrachloride the shipowner required as a cleaning agent in *Halecki, supra,* was more deadly than the carbon monoxide fumes from hilo machines that were required to be used in the hold for the placement of respondent's cargo of steel and tinplate. *Halecki, supra,* is cited in the opinion below for negligence only, "where the shipowners required the use of the deadly cleaning agent and were held under a duty of care in selecting competent contractors to work with it, or supervising its use".

On a general verdict, no party requesting special interrogatories, the unanimous federal jury assessed damages in the amount of $145,000.00 for petitioner's total and permanent disability and exonerated the stevedore on the shipowner's claim over. Both verdicts were reversed on appeal by an opinion dated April 9, 1965. When petitioner moved for a rehearing the Court revised its opinion on June 15, 1965, but concluded as before. The difference between the two opinions relates to the instruction on maritime negligence, holding in the first opinion that constructive notice must be excised on the authority of *Filipek* v. *Moore-McCormack Lines, Inc.,* 258 F. 2d 734, C.A. 2 1958, cert. den. 359 U. S. 927 (on personal injuries of a boom tester held to be in the category of a repairman, not a longshoreman), and in the second opinion adding the authority of *Berti* v. *Compagnie de Navigation, etc.,* 213 F. 2d 397, C.A. 2 1954 (on personal injuries to a longshoreman caused by the negligent manner in which the stevedore did its work while in control of the operation and equipment), and *Halecki, supra.*

Reasons for Granting the Writ

The significance of the opinion below in the sensitive field of maritime law, written with apparent disregard of the paramount authority of well defined principles enunciated by this Court, is that it seeks to establish a novel and retrogressive principle of law exonerating a shipowner from its historic and non-delegable obligation of due diligence and care when it knew or should have known that a longshoreman was working in an unsafe place aboard its merchant vessel in navigable waters. By this decision a remedy in negligence for maritime workers doing the work of seamen is diluted to less than any other common-law personal injury litigant would expect. Error is compounded where the opinion would refuse a jury to hear and weigh the standards of safety promulgated by the Secretary of Labor, which in this case do not add new responsibilities or duties on shipowners, and where the instant respondent sought to introduce them before the same jury solely against the stevedore in its claim over. The dissent by the late Chief Judge Clark in *Palermo* v. *Luckenbach Steamship Co., Inc.*, 246 F. 2d 557, 561 C.A. 2, reversed summarily by this Court at 355 U. S. 20, 78 S. Ct. 1, is applicable here where he wrote:

> "I have had occasion recently to express my concern at a growing tendency in this court to upset awards in jury cases . . . To-day's decision continues that trend, adding some new curiosities".

The instant opinion's "new curiosities" that adversely affect the uniform fabric of the maritime law, are as follows:

1. On removing constructive notice as part of the definition of maritime negligence, by citing inapposite and

long overruled cases on concepts of control and supervision, the Court of Appeals ignores the fundamental definition of maritime negligence, contrasted with the separate and distinct cause of action for unseaworthiness. In *Gutierrez* v. *Waterman S.S. Corp.*, 373 U. S. 206, this Court recently defined shipowner *negligence* to mean "when it knew or should have known that injury was likely to result . . ." (p. 210 of 373 U. S.); and "control of the impact zone is not essential for negligence", and "it had an absolute and non-delegable duty of care toward petitioner not to create this risk to him, which it failed to meet" (pp. 211, 212 of 373 U. S.).

2. Adding *Berti* v. *Compagnie de Navigation, etc.*, 213 F. 2d 397, C.A. 2 1954, and *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Assoc., supra,* the revised opinion below still is without decisional authority to support the excision of constructive notice that the Court below initially sought in *Filipek* v. *Moore-McCormack Lines, Inc.*, 258 F. 2d 734, C.A. 2 1958, cert. den. 359 U. S. 927.

Berti, supra, of doubtful authority even in its most narrow construction to deny liability "only upon the negligent manner in which the independent contractor did the work", *Pioneer S.S. Co.* v. *Hill,* 227 F. 2d 264, C.A. 6 1955, opinion by Potter Stewart, *C.J.*, was also restricted by Learned Hand, *C.J.* in *Amador* v. *A/S J. Ludwig Mowinckels,* 224 F. 2d 437, 441, C.A. 2 1955, holding that *Berti* " . . . decided no more than that in spite of the defects—in that case of gear—the ship was 'reasonably' fit for her service, which is the accepted test". After this Court in *Crumady* v. *The Fisser,* 358 U. S. 423 (1959), held negligence may cast the shipowner into initial liability, Hoffman, *D.J.* in *Holley* v. *The Manfred Stansfield,* 186 F. Supp. 212, 215 observed the *Berti* rule to be of "questionable vitality in the light of

Crumady". As in *Crumady*, and unlike *Berti*, the instant case is not concerned with the negligence of the stevedore, but relates to proof of neglect of the shipowner, particularly the shipowner's affirmative failure of obligation to turn on the ship's adequate ventilation system, contrary to its assurances and its direction to the longshoremen to continue work.

In exonerating the stevedore, the jury obviously believed that after receiving complaints from the longshoremen, the ship's mate assured them he would turn on the ventilating system and directed them to continue the work. This fact constitutes actual notice to the shipowner and renders academic any question of constructive notice.

Reference in both opinions below to *Filipek, supra,* concerning a ship's rigger injured while testing booms and so in the category of a shoreside specialist not entitled to a seaman's rights as established by this Court in *Sieracki* v. *Seas Shipping Co.*, 328 U. S. 85, points up the error below in relating longshoremen to the limited rights and remedies of repairmen rather than to the extended rights of seamen. This error was referred to in the petitions for rehearing, resulting in the revised opinion citing *Berti* and *Halecki, supra,* in support of the same erroneous conclusion against petitioner.

Of course *Halecki, supra,* finding liability on the failure of the shipowner to provide adequate ventilation for a shipcleaner, in the lesser maritime category than a longshoreman, supports petitioner's position. As with carbon tetrachloride in *Halecki, supra,* it was for the jury in the instant case on carbon monoxide poisoning to determine whether the shipowner failed in an affirmative duty to prevent or reduce a condition of air contamination caused by the known use of hilos in a partially covered hold. This

affirmative duty arises as much from constructive notice as actual notice. To hold otherwise would encourage shipowners to ignore dangerous conditions, to limit their safety inspections during cargo operations, and impose on the injured longshoreman the heavier burden of proving actual notice, which was denied here, though the danger was clearly foreseeable and extended for a substantial time after the second hilo commenced operation.

3. It is apparent that the "new curiosities" in the instant case include strained reasons to support an underlying premise against jury verdicts for longshoremen. There is an unjustified concern that in determining questions of negligence juries will fall short of a fair performance of their Constitutional function. It is for the jury to determine the shipowner's breach of duty to exercise reasonable care. To limit the jury's consideration of negligence by excluding an instruction on constructive notice, a concept engrained in our law and never before so challenged, is to preclude the assertion of the community's sense of values. Issues on lack of care and due diligence, sounding in negligence, are better understood and more forcefully applied than the separate and strict warranty of seaworthiness where there is no need to prove due diligence, notice or fault.

Inconsistently the opinion below concedes substantial proof in the record of an unsafe place to work overlapping unseaworthiness, and ignores the multiple stipulations and concessions by respondent's counsel during the trial and in its brief on appeal, to reverse a unanimous general jury's verdict sought by the parties.

4. Again underestimating the jury's capacity to understand, the Court of Appeals states there would be a con-

fusion of the issue between petitioner and the shipowner to instruct on the pertinent standards of safety promulgated by the Secretary of Labor, pursuant to Congressional authority and set forth in the Safety and Health Regulations for Longshoring. It cannot be proper for the same jurors to blindfold themselves and narrowly consider these regulations as offered by respondent on its claim over against the stevedore. As the 4th Circuit Court of Appeals stated in *Provenza, supra,* at page 665 of 324 F. 2d, "Nevertheless, if the violation of the regulations by the stevedore created a dangerous condition then the law is clear that the shipowner is in turn also liable. . . ."

There is obvious conflict on the use of safety regulations during trial between the Court of Appeals for the 2nd Circuit and the 4th Circuit Court of Appeals in *Provenza, supra.*

This learned Court has not yet passed on the Safety and Health Regulations for Longshoring as they may apply to maritime cases. The safety regulations are pertinent to all future maritime trials, and a definitive ruling by this Court to establish uniformity is required and needed by all Courts passing on maritime negligence cases. The continued vitality of *Kernan* v. *American Dredging Co.*, 355 U. S. 426, and the analogous *Federal Safety Appliance Act,* 45 U. S. C. A. 1-16, in their application to this issue, should also be considered. Cf. *Myers* v. *Reading Co.*, 331 U. S. 477.

CONCLUSION

Reason and the cases cited unequivocally support petitioner's contention that here is a compelling need for this learned Court to express the law as it should be on maritime negligence and the use of safety regulations during trial, so that all future maritime cases will be resolved on the law expressed by the Supreme Court and not by the "curiosities" in the opinion below.

Respectfully submitted,

PHILIP F. DiCOSTANZO
Attorney for Petitioner

Dated: Brooklyn, New York
1965.

ROBERT KLONSKY
On Petition

—4—

APPENDIX A

Safety and Health Regulations for Longshoring (29 C. F. R. Sec. 9.1 *et seq.*), promulgated by the Secretary of Labor under the authority of Public Law 85-742, 72 Stat. 835, 33 U. S. C. A. Sec. 941 *et seq.*

§ 9.1 PURPOSE AND AUTHORITY

(a) The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U.S.C. 901 et seq.) provides compensation for injuries suffered by employees when they

—5—

are working for private employers within the Federal maritime jurisdiction on the navigable waters of the United States, including dry docks. Public Law 85-742, 72 Stat. 835, approved August 23, 1958, which amends section 41 of the Longshoremen's and Harbor Workers' Compensation Act, as amended (44 Stat. 1444; 33 U.S.C. 941) requires, among other things, that every employer of the aforementioned employees "shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees." It is the purpose of the regulations of this part to carry out the intent of Public Law 85-742.

(b) Pursuant to Public Law 85-742 the regulations of this part do not make determinations with respect to matters under the control of the United States Coast Guard within the scope of Title 52 of the Revised Statutes and

Appendix A

Acts supplementary or amendatory thereto (46 U.S.C. 1-1388, passim), including, but not restricted to, the master, ship's officers, crew members, design, construction, and maintenance of the vessel, its gear and equipment; to matters within the regulatory authority of the United States Coast Guard to safeguard vessels, harbors, ports, and waterfront facilities under the provisions of the Espionage Act of June 15, 1917, as amended (40 Stat. 220; 50 U.S.C. 191 et seq.; 22 U.S.C. et seq.) or to matters within the regulatory authority of the United States Coast Guard with respect to lights, warning devices, safety equipment and other matters relating to the promotion of safety of lives and property under section 4(e) of the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462; 43 U.S.C. 1333).

—6—

§ 9.2 Scope and Responsibility

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in section 9.3(c) of this part.

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from reponsibilities or duties now placed upon them by law, regulation or custom.

* * *

§ 9.3 Definitions

(c) The term "employer" means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments as defined

herein within the Federal maritime jurisdiction on the navigable waters of the United States.

(d) The term "employee" means any longshoreman, or other person engaged in longshoring operations or related employments, within the federal maritime jurisdiction on the navigable waters of the United States, other than the master, ship's officers, crew of the vessel, or any person engaged by the master to load or unload any vessel under 18 net tons.

• • •

—42—

§ 9.93 Ventilation and Atmospheric Conditions.

(a) When internal combustion engines exhaust into the hold or intermediate deck, and neither natural ventilation nor the ship's ventilating system is adequate to keep the carbon monoxide content of the atmosphere in the hold or intermediate deck below 100 parts per million, the employer shall use blowers sufficient in size and number and so arranged as to do so. The intakes of blowers shall be adequately guarded by screens.

(c) Before employees are permitted to enter or work in stowage spaces or tanks in which explosive, poisonous, noxious or gaseous cargoes have been carried or are stowed, or in which dry ice has been used as a refrigerant, or which have been fumigated, or in which there is a possibility of oxygen deficiency, the employer shall ascertain from the officer in charge of the vessel the conditions of the work place with respect to atmospheric contaminants.

(d) When it is ascertained from the officer in charge of the vessel that the atmosphere in which employees would be working is immediately dangerous to life, or if the

—43—

atmosphere becomes immediately dangerous to life during cargo handling operations, no employee shall be permitted to enter or remain in the work place until the atmospheric condition has been made safe. Atmospheres immediately dangerous to life are those which contain less than 16.5 percent oxygen, or which by reason of the high toxicity of the contaminant, as in fumigation, or the high concentration of contaminants, as with carbon dioxide, would endanger the life of a person breathing them for even a short period of time.

(e) When it is ascertained from the officer in charge of the vessel that the atmosphere in which employees would be working contains gaseous contaminants not immediately dangerous to life, or if the atmosphere becomes so contaminated during cargo handling operations, no employee shall be permitted to enter or remain in the work place until the atmosphere is made safe, or the employees are protected by suitable respiratory protective equipment in accordance with the requirements of § 9.102 (a) and (b). Gaseous contaminants not immediately dangerous to life are gases present in concentrations that could be breathed for a short period without endangering the life of a person breathing them, but which might produce discomfort and possible injury after a prolonged single exposure or repeated short exposures.

* * *

APPENDIX B

Revised Opinion of June 15, 1965

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 212—September Term, 1964.

(Argued December 3, 1964
Revised opinion filed June 15, 1965.)

Docket No. 29155

ANTHONY ALBANESE,

Plaintiff-Appellee,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

Before:

FRIENDLY and SMITH, *Circuit Judges*, and
BLUMENFELD, *District Judge.**

* Sitting by designation.

Appendix B

Revised Opinion

Appeal by shipowner, defendant and third party plaintiff, from judgment entered on verdict after trial to the

—96a—

jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* in favor of plaintiff longshoreman to recover $145,000 damages, and in favor of stevedore, third party defendant.

Reversed and remanded.

ROBERT KLONSKY, New York, N. Y. (Philip F. DiCostanzo, New York, N. Y., on the brief), *for plaintiff-appellee.*

EDMUND F. LAMB, New York, N. Y. (Purdy, Lamb & Catoggio, of counsel to Schaffner & Furey, on the brief), *for defendant-appellant and third-party plaintiff-appellant.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Alexander, Ash & Schwartz and Sidney A. Schwartz, New York, N. Y., on the brief), *for third-party defendant-appellee.*

SMITH, *Circuit Judge*:

Albanese, a longshoreman in the employ of stevedore International Terminal Operating Co., Inc., injured by monoxide gas fumes while working in the hold of the vessel M.S. Schiedyk, owned by N.V. Nederl., brought action for damages against the shipowner, which impleaded I. T. O. as third party defendant. After trial to the jury in the United States District Court for the Southern District of

Appendix B

New York, Irving Ben Cooper, *Judge*, judgment was entered on verdict in favor of plaintiff against N.V. Nederl. and in favor of the stevedore dismissing the third party complaint, and N.V. Nederl. appeals. We find error in the charge on the principal action and on the claim over, and reverse and remand for new trial.

—97a—

Plaintiff was a member of a gang of longshoremen working in the lower No. 2 hold of the Schiedyk. From 8:00 a.m. to 10:45 a.m. on the day of plaintiff's injury a gasoline powered hilo owned by I. T. O. was working in this hold. About 10:45 a.m. a second gang began to work in the after half of the upper 'tween deck of No. 2 hold, employing a second hilo. The ship had a ventilating system often used when hilos were working in the holds, which was not turned on the day in question prior to plaintiff's injury. It was raining and a hatch tent partly covered the upper hatch opening. The hatch between the 'tween deck and the lower hold was party covered with hatch boards. I. T. O. had portable blowers at the pier, none of which were in use at No. 2 hold. There was evidence that about 10 or 15 minutes after the second gang entered the hold, men complained of fumes from the hilos and the winch operator and signalman at the hatch asked a ship's officer to turn the blowers on. There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed some time between 11:15 and 11:30 a.m. the blowers had not been turned on and the men left the hatch.

If the hatch bosses some time between 10:55 a.m. and 11:05 a.m. asked a ship's officer to turn on the ship's ven-

tilating system and he agreed to do so, a finding of defendant's negligence would be justified. The charge, however, allowed the jury also to find against the defendant on the basis of negligence (as distinguished from unseaworthiness) even if it did not have actual knowledge of an unsafe condition in the hold, if the jury determined that such a

—98a—

condition existed for a sufficient length of time to charge the shipowner with notice of it and the shipowner did not act to prevent injury. This was erroneous, for when a shipowner hires a qualified stevedore to load the vessel the standard of due care does not require that the actively supervise the stevedore's work or that he take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist. As pointed out in *Berti* v. *Compagnie de Navigation, etc.*, 213 F. 2d 397, 2 Cir. 1954, to lay down a contrary rule, which on the facts here would mean that mere knowledge of the use of hilos would create a duty on the part of the owner to turn on the ventilators even though he had no knowledge that the hold had become an unsafe place to work, would be to confuse the concept of unseaworthiness with that of negligence. Cf. *Filipek* v. *Moore-McCormack Lines, Inc.*, 258 F. 2d 734, 737, 2 Cir. 1958, cert. den. 359 U. S. 927. Contrast *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, 282 F. 2d 137, 2 Cir. 1960, 302 F. 2d 840, 2 Cir. 1962, where the shipowners themselves required the use of the deadly cleaning agent and were held under a duty of care in selecting competent contractors to work with it, or supervising its use.

The jury had been instructed that the owner would be liable, with or without knowledge, if the ship had become unseaworthy because of a dangerous condition created by

noxious fumes in the hold. This was correct, and if the verdict was reached on this theory, the verdict against the owner would be sustained, if the trial was otherwise free from error. However, the erroneous charge on negligence may have been the basis of the verdict. The jury's attention was directed in the charge to negligence in the

—99a—

absence of actual notice. Liability, if present in the absence of knowledge in this case, is based not on a duty of care, but on absolute liability for unseaworthiness, actual unfitness of the vessel for the use to which it is being put. Unfortunately, we cannot tell from the general verdict whether it was based on a finding of unseaworthiness, on a finding of failure to turn on the ventilators after agreeing to do so, or on the erroneous charge on constructive notice as a basis for a finding of lack of care. On the issue of whether an unsafe condition in fact existed, there was evidence of the men's complaints, and of course of plaintiff's injury. This might well have supported a verdict based on unseaworthiness. However, we do not find this evidence so plainly determinative of the issue that it required such a verdict. We cannot, therefore, ignore the instructions on negligence and direct a verdict for plaintiff on the ground of unseaworthiness. In view of the alternative claims here, special interrogatories to the jury might have been helpful in determining the basis of the verdict and the court may well consider their use on retrial.

Another claimed error is the charge that no contributory negligence on the part of the plaintiff had been shown. While the better practice is to let this question go to the jury, *LaGuerra* v. *Brasileiro*, 124 F. 2d 553, 2 Cir. 1942, we cannot say that the ruling was error in the circumstances of this case where evidence was lacking that Albanese knew

of the complaints or appreciated the danger on the day of his injury, or indeed had any real choice of action if he had. There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the Safety and Health Regulations for Longshoring were binding on the shipowner, in spite of the excluding clause of

§9.2(b)[1] and the lack of any testimony as to what the concentration of carbon monoxide in the hold in fact was. Ordinarily, such regulations of stevedoring practices are not relevant to the issues involved in the claim against the shipowner, and clearly could only confuse the issue here, where, although it was stipulated that the ship's blowers were adequate if used, there was no evidence from which the jury could determine whether the level of gas concentration at which the stevedore was forbidden to work without blowers had in fact been reached.

We find error also in the instructions on the claim over. The jury could certainly find that the stevedore did not fulfill his duty of workmanlike service under his warranty to the owner in permitting the men to continue work in the hold after the stevedore had notice of the conditions in the hold, had requested the blowers to be turned on and the request was not promptly complied with. *Nicroli* v. *Den*

---

[1] §9.2 Scope and Responsibility

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in section 9.3(c) of this part.

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

Norske, 332 F. 2d 651, 656, 2 Cir. 1964. The instruction that the request to the ship's officer was sufficient to absolve the stevedore was error. *Misurella* v. *Isthmian Lines*, 328 F. 2d 40, 2 Cir. 1964. Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough. *Misurella, supra. Weyerhaeuser SS Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563, 567. There was no evidence of active "hindrance" by the ship. I. T. O. could either have ordered the men out of the hold when it discovered that conditions were becoming dangerous and the ship's blowers were not turned on, or it could have used its own portable blowers.

101a—

The judgment is set aside, on both the complaint and the claim over, and the case is remanded to the District Court for trial.

APPENDIX C

Original Opinion of April 9, 1965

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 212—September Term, 1964.

(Argued December 3, 1964 Decided April 9, 1965.)

Docket No. 29155

ANTHONY ALBANESE,

Plaintiff-Appellee,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

Before:

FRIENDLY and SMITH, *Circuit Judges,* and BLUMENFELD, *District Judge.**

Appendix C

Appeal by shipowner, defendant and third party plaintiff, from judgment entered on verdict after trial to the jury in the United States District Court for the Southern District

—43a—

of New York, Irving Ben Cooper, *Judge*, in favor of plaintiff longshoreman to recover $145,000 damages, and in favor of stevedore, third party defendant.

Reversed and remanded.

ROBERT KLONSKY, New York, N. Y. (Philip F. DiCostanzo, New York, N. Y., on the brief), *for plaintiff-appellee.*

EDMUND F. LAMB, New York, N. Y. (Purdy, Lamb & Catoggio, of counsel to Schaffner and Furey, on the brief), *for defendant-appellant and third-party plaintiff-appellant.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Alexander, Ash & Schwartz, and Sidney A. Schwartz, New York, N. Y., on the brief), *for third-party defendant-appellee.*

SMITH, *Circuit Judge*:

Albanese, a longshoreman in the employ of stevedore International Terminal Operating Co., Inc., injured by monoxide gas fumes while working in the hold of the vessel M. S. Schiedyk, owned by N. V. Nederl., brought action for damages against the shipowner, which impleaded I. T. O. as third party defendant. After trial to the jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*, judgment was entered on verdict in favor of plaintiff against N. V. Nederl. and

in favor of the stevedore dismissing the third party complaint, and N. V. Nederl. appeals. We find error in the charge on the principal action and on the claim over, and reverse and remand for new trial.

—44a—

Plaintiff was a member of a gang of longshoremen working in the lower No. 2 hold of the Schiedyk. From 8:00 a.m. to 10:45 a.m. on the day of plaintiff's injury a gasoline powered hilo owned by I. T. O. was working in this hold. About 10:45 a.m. a second gang began to work in the after half of the upper 'tween deck of No. 2 hold, employing a second hilo. The ship had a ventilating system often used when hilos were working in the holds, which was not turned on on the day in question prior to plaintiff's injury. It was raining and a hatch tent partly covered the upper hatch opening. The hatch between the 'tween deck and the lower hold was partly covered with hatch boards. I. T. O. had portable blowers at the pier, none of which were in use at No. 2 hold. There was evidence that about 10 or 15 minutes after the second gang entered the hold, men complained of fumes from the hilos and the winch operator and signalman at the hatch asked a ship's officer to turn the blowers on. There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed sometime between 11:15 and 11:30 a.m. the blowers had not been turned on and the men left the hatch.

On this state of the proof we should have no difficulty in upholding the verdict for the plaintiff had the charge properly placed the issues before the jury, for if the hatch

bosses sometime between 10:55 a.m. and 11:05 a.m. asked a ship's officer to turn on the ship's ventilating system and he agreed to do so, a finding of defendant's negligence would be justified. The charge, however, allowed the jury also to find the defendant negligent even if it did not have actual knowledge of an unsafe condition in the hold, if the

—45a—

jury determined that such a condition existed for a sufficient length of time to charge the shipowner with notice of it and the shipowner did not act to prevent injury. This was erroneous, for a shipowner who hires a qualified stevedore to load the vessel is not bound to any duty of active supervision of the stevedore's work. *Filipek* v. *Moore-McCormack Lines, Inc.*, 258 F. 2d 734, 737, 2 Cir. 1958, cert. den. 359 U. S. 927, and if the owner had no actual notice that hilos were in use in the holds it would have no duty to turn on the ventilating equipment if the request to do so had not in fact been made. If the owner had such a duty of supervision, the mere use of the hilos in the hold might require his turning on the ventilators, to prevent a dangerous accumulation, even though the hold had not yet become an unfit place to work.

The jury had been instructed that the owner would be liable, with or without knowledge, if the ship had become unseaworthy because of a dangerous condition created by noxious fumes in the hold. This was correct, and if the verdict was reached on this theory, the verdict against the owner would be sustained, if the trial was otherwise free from error. However, the erroneous charge on negligence may have been the basis of the verdict. The jury's attention was directed in the charge to negligence in the absence of actual notice. Liability, if present in the absence

of knowledge in this case, is based not on a duty of care, but on absolute liability for unseaworthiness, actual unfitness of the vessel for the use to which it is being put. Unfortunately, we cannot tell from the general verdict whether it was based on a finding of unseaworthiness, on a finding of failure to turn on the ventilators after agreeing to do so, or on the erroneous charge on constructive notice as a basis for a finding of lack of care. On the issue

—46a—

of whether an unsafe condition in fact existed, there was evidence of the men's complaints, and of couse of plaintiff's injury. This might well have supported a verdict based on unseaworthiness. However, we do not find this evidence so plainly determinative of the issue that it required such a verdict. We cannot, therefore, ignore the instructions on negligence and direct a verdict for plaintiff on the ground of unseaworthiness. In view of the alternative claims here, special interrogatories to the jury might have been helpful in determining the basis of the verdict and the court may well consider their use on retrial.

Another claimed error is the charge that no contributory negligence on the part of the plaintiff had been shown. While the better practice is to let this question go to the jury, *LaGuerra* v. *Brasileiro,* 124 F. 2d 553, 2 Cir. 1942, we cannot say that the ruling was error in the circumstances of this case where evidence was lacking that Albanese knew of the complaints or appreciated the danger on the day of his injury, or indeed had any real choice of action if he had. There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the Safety and Health Regulations for Longshoring were binding on the shipowner, in spite of the

excluding clause of §9.2(b)[1] and the lack of any testimony as to what the concentration of carbon monoxide in the

—47a—

hold in fact was. Ordinarily, such regulations of stevedoring practices are not relevant to the issues involved in the claim against the shipowner, and clearly could only confuse the issue here, where, although it was stipulated that the ship's blowers were adequate if used, there was no evidence from which the jury could determine whether the level of gas concentration at which the stevedore was forbidden to work without blowers had in fact been reached.

We find error also in the instructions on the claim over. The jury could certainly find that the stevedore did not fulfill his duty of workmanlike service under his warranty to the owner in permitting the men to continue work in the hold after the stevedore had notice of the conditions in the hold, had requested the blowers to be turned on and the request was not promptly complied with. *Nicroli* v. *Den Norske*, 332 F. 2d 651, 656, 2 Cir. 1964. The instruction that the request to the ship's officer was sufficient to absolve the stevedore was error. *Misurella* v. *Isthmian Lines*, 328 F. 2d 40, 2 Cir. 1964. Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the

---

[1] §9.2 Scope and Responsibility

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in section 9.3(c) of this part.

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough. *Misurella, supra. Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563, 567. There was no evidence of active "hindrance" by the ship. I. T. O. could either have ordered the men out of the hold when it discovered that conditions were becoming dangerous and the ship's blowers were not turned on, or it could have used its own portable blowers.

The judgment is set aside, on both the complaint and the claim over, and the case is remanded to the District Court for trial.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of June one thousand nine hundred and sixty-five.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

HON. M. JOSEPH BLUMENFELD,
District Judge.

ANTHONY ALBANESE,
Plaintiff-Appellee,

—v.—

N.V. NEDERL. AMERIK STOOMV. MAATS.,
Defendant and
Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Appendix D

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed on both the complaint and the claim over and that the action be and it hereby is remanded to said District Court for a new trial in accordance with the opinion of this Court with costs to defendant-appellant.

A. DANIEL FUSARO
Clerk